

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK HEINRICHS, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

WELLS FARGO BANK, N.A.,

Defendant.

No. C 13-05434 WHA

**ORDER DENYING
MOTION TO DISMISS; AND
DENYING MOTION FOR
JUDICIAL NOTICE AS MOOT**

INTRODUCTION

This is a putative class action brought under the Telephone Consumer Protection Act. Defendant moves to dismiss the amended complaint under Rule 12(b)(6), and requests judicial notice of two petitions. For the reasons stated below, the motion to dismiss is **DENIED**. The motion for judicial notice is **DENIED AS MOOT**.

STATEMENT

The following well-pled facts are assumed to be true for purposes of this order. In March 2013, defendant Wells Fargo Bank, N.A. began calling plaintiff Mark Heinrichs, using an automatic telephone dialing system that placed prerecorded calls to Heinrichs' cell phone. This was reportedly done so that Wells Fargo could collect debt owed by another party, "Scott."

Heinrichs does not owe this debt. Nor does he know who "Scott" is. Heinrichs also has not provided any personal information — including his cell phone number — to Wells Fargo. Nevertheless, Wells Fargo "has initiated approximately 20 telephone calls to [Heinrichs']

cellular telephone” in an attempt to collect the debt owed by “Scott”. Because Wells Fargo’s calls were prerecorded, Heinrichs “had no ability to request that the calls end [or] voice [his] complaints regarding the calls to a real person” (Amd. Compl. ¶¶ 11–13, 18).

On November 22, 2013, Heinrichs initiated this putative class action. He later filed an amended complaint on January 15, 2014, alleging two claims — one for violations of the Telephone Consumer Protection Act, and the other for knowing and willful violations of that Act. Wells Fargo now moves to dismiss the amended complaint under Rule 12(b)(6), and requests judicial notice of two petitions. Following full briefing and oral argument, the order decides both motions below.

ANALYSIS

1. MOTION TO DISMISS.

Under Section 227(b)(1)(A) of Title 47 of the United States Code, the TCPA states (emphasis added):

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States —

(A) to make any call (*other than a call . . . made with the prior express consent of the called party*) using any automatic telephone dialing system or an artificial or prerecorded voice . . .

* * *

(iii) to any telephone number assigned to a paging service, *cellular telephone service*, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call . . .

In their briefs, the parties dispute only one issue: whether or not the “called party” gave prior express consent to Wells Fargo’s calls. If the answer is yes, Wells Fargo is exempt from liability under Section 227(b)(1)(A). As such, Wells Fargo contends that the amended complaint fails to state a claim because there is no allegation that the calls were made without “Scott’s” consent. This, of course, assumes that “Scott” was the “called party” for purposes of the consent exemption. Heinrichs disagrees, arguing that he was the “called party” because he actually

received the calls, though it is uncontested that Wells Fargo was trying to reach “Scott.” To that end, Heinrichs did not give consent for those calls (Amd. Compl. ¶ 18).

While the undersigned judge is inclined to agree with the analysis set forth in *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012) — the only appellate decision so far to define “called party” for purposes of the consent exemption, as provided under Section 227(b)(1)(A) — the order need not determine who “the called party” was to decide the present Rule 12(b)(6) motion. This is because the consent exemption is not an element of Heinrichs’ TCPA claims. Our court of appeals has stated (emphasis added):

Calls otherwise in violation of the TCPA are not unlawful if made “for emergency purposes or made with the prior express consent of the called party,” 47 U.S.C. § 227(b)(1)(A); however, “*express consent*” is not an element of a TCPA plaintiff’s *prima facie* case, but rather is an affirmative defense for which the defendant bears the burden of proof.

Grant v. Capital Mgmt. Servs., L.P., 449 F. App’x 598, 600 n.1 (9th Cir. 2011). This is in line with the Federal Communications Commission’s regulations, which state that a creditor, such as Wells Fargo, “should be responsible for demonstrating that the consumer provided prior express consent.” *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Request of A CA Int’l for Clarification and Declaratory Ruling*, 23 F.C.C.R. 559, 565 (Jan. 4, 2008).

District courts in this circuit have also recognized the consent exemption as an affirmative defense — and not an element of a TCPA claim — at the pleading stage. *See, e.g., Sepehry-Fard v. Dep’t Stores Nat’l Bank*, 13-CV-03131-WHO, 2013 WL 6574774 (N.D. Cal. Dec. 13, 2013) (Judge William H. Orrick); *Connelly v. Hilton Grant Vacations Co., LLC*, 12CV599 JLS KSC, 2012 WL 2129364, *3 (S.D. Cal. June 11, 2012) (Judge Janis L. Sammartino). Indeed, the defendants in *Sepehry-Fard* moved to dismiss a TCPA claim under Rule 12(b)(6) because the plaintiff had not alleged that the phone calls there were made without consent. Nonetheless, *Sepehry-Fard* held that the plaintiff did not need to affirmatively allege such a lack of consent, because “express consent is not an element of a TCPA plaintiff’s *prima facie* case” 2013 WL 6574774 at *3 (internal quotations omitted). So too here.

Wells Fargo, however, argues that lack of consent *is* an element of a TCPA claim (Br. 8–9). For support, Wells Fargo points to *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012), as well as a decision from the undersigned judge, *Fields v. Mobile Messengers Am., Inc.*, C 12-05160 WHA, 2013 WL 6073426, *3 (N.D. Cal. Nov. 18, 2013). Wells Fargo also cites to a string of decisions from outside this jurisdiction to bolster its argument. *See, e.g., Pugliese v. Prof'l Recovery Serv., Inc.*, 09-12262, 2010 WL 2632562 (E.D. Mich. June 29, 2010).

None of these decisions are persuasive here. It is true that *Meyer* listed “the three elements of a TCPA claim” as “(1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient’s prior express consent,” but this was in the context of a preliminary injunction request, and specifically, the plaintiff’s likelihood of success on the merits in that case. 707 F.3d at 1043.

Fields is likewise distinguishable. There, the undersigned judge only addressed consent in connection with a motion for class certification. In fact, the specific issue was “whether consent in TCPA putative class actions is a common issue that can be resolved with common proof,” with the undersigned judge placing “the burden on plaintiffs to prove a lack of prior express consent” in seeking class certification. 2013 WL 6073426 at *3.

In short, because *Meyer* and *Fields* did not decide whether lack of consent must be affirmatively pled to survive a Rule 12(b)(6) motion, neither these decisions nor the out-of-circuit decisions cited by Wells Fargo override the ones discussed above, at least at this pleading stage. The order thus finds that the amended complaint need not allege lack of consent to plead a TCPA claim. As Wells Fargo challenges the amended complaint only on consent grounds, its motion to dismiss is accordingly **DENIED**.

2. MOTION FOR JUDICIAL NOTICE.

As part of its reply, Wells Fargo requests judicial notice of two petitions to the FCC for expedited declaratory rulings. According to Wells Fargo, these petitions may result in a decision on the consent exemption issue, as they would require the FCC to clarify the meaning of “called

1 party” under that exemption. In that connection, Wells Fargo has filed a separate motion to stay
2 this action, which is set for hearing on April 10, 2014.

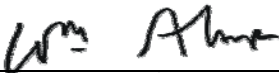
3 For purposes of the present motion to dismiss, however, it is unnecessary to consider
4 these two petitions. As such, the motion for judicial notice is **DENIED AS MOOT**.

5 **CONCLUSION**

6 For the reasons stated above, the motion to dismiss is **DENIED**. The motion for judicial
7 notice is **DENIED AS MOOT**. Wells Fargo must file its answer to the amended complaint by **5**
8 **PM ON MARCH 20, 2014**.

9
10 **IT IS SO ORDERED.**

11
12 Dated: March 7, 2014.

13 
14 _____
15 WILLIAM ALSUP
16 UNITED STATES DISTRICT JUDGE
17
18
19
20
21
22
23
24
25
26
27
28